

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

City and County of San Francisco,

Complainant,

vs.

NextG Networks of California, Inc. (U 6754 C)

Defendant.

Case 05-03-010
(Filed March 9, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING
SUPPLEMENTAL INFORMATION, EXPLANATION OF
APPARENT EX PARTE COMMUNICATION, AND
FURTHER BRIEFING ON MOTION TO DISMISS**

This ruling requests supplemental information from The City and County of San Francisco (CCSF) as required of complainants by Rule 6(b)(1) of the Commission's Rules of Practice and Procedure. This ruling also requires NextG Networks of California, Inc. (NextG) to address its apparent ex parte communication of May 12, 2005. Finally, this ruling requests further briefing on NextG's motion to dismiss the complaint for failure to show a violation of law or order upon which the Commission can grant relief. Responses to this ruling are due on May 27, 2005, and replies are due on June 6, 2005.

Background

CCSF claims that NextG is violating the terms of the certificate of public convenience and necessity (CPCN) granted in Decision (D.)03-01-061, because

NextG : 1) has failed to timely exercise its authority to offer competitive local exchange or interexchange services, and 2) is representing to CCSF that it is authorized to provide radio frequency transport services, a service the Commission does not regulate. CCSF further claims that NextG is violating the terms and conditions of its CPCN because the Commission has not authorized NextG to install either: 1) microcell and antenna facilities in the public rights-of-way, or 2) any equipment or facilities on existing utility poles.

On March 30, 2005, NextG filed a motion for assigned commissioner's ruling dismissing complaint and a motion for expedited consideration of its motion to dismiss. On April 14, 2005, CCSF filed its opposition to the motion to dismiss, its partial opposition to the motion for expedited consideration and a motion to strike evidence submitted in support of the motion to dismiss. On April 19, 2005, NextG filed its reply.

Discussion

Rule 6(b)(1) requires that complainants provide the proposed category for the proceeding, the need for hearing, the issues to be considered, and a proposed schedule. CCSF proposed that the complaint be treated as an adjudicatory proceeding and stated four claims for relief. CCSF did not request hearings in its complaint, although the Instructions to Answer categorized the complaint as an adjudicatory proceeding and noted the administrative law judge would set hearings.

I am not persuaded hearings are necessary in this proceeding. It appears this proceeding could be resolved on the motion to dismiss or on briefs. After reviewing the pleadings filed to date, including the statement of facts contained in CCSF's opposition to the motion to dismiss, it does not appear that there are disputed facts. Although CCSF states that the services NextG is offering are

disputed and hearings are required to elucidate the nature of those services, it does not appear that the services that are the subject of this complaint are unknown to CCSF or that extensive hearings would be necessary to understand them. Nonetheless, I request CCSF to state in its comments which radio frequency transport services it believes are in dispute and what discovery it needs to do to elucidate the nature of those services.

CCSF did not provide a proposed schedule. If CCSF still believes hearings are required, it shall provide a proposed schedule. NextG shall have the opportunity to respond to the information provided by CCSF. CCSF also shall serve all pleadings on the assigned administrative law judge as required by Rule 2.3.

On May 12, 2005, NextG sent an e-mail to Peter Hanson with three attachments informing him of CCSF's actions on rights-of-way access for traditional wireless carriers. This apparent ex parte communication occurred despite the ban on such communications in adjudicatory proceedings. (Rule 7(b).) NextG shall explain what circumstances prompted this communication and shall recommend what action the Commission should take in response to this apparent violation of the Commission's ex parte rules.

I request further briefing on matters raised in the pleadings concerning NextG's motion to dismiss. I find merit in NextG's assertion that it has not violated the stated terms and conditions of Decision (D.) 03-01-061. Although the parties have briefed their interpretations of that decision, I request further briefing on the alleged violations. Specifically, I request the parties to address whether the installation of microcell and antenna facilities on existing buildings and structures is categorically exempt from CEQA under General Order 159-A. (See D.01-06-019.) If either party asserts installation of microcell and antenna

facilities in the public rights-of-way is not exempt from CEQA, I request that party address whether the Commission must explicitly deny requested authority in order for the Commission to find that a carrier has violated the terms and conditions of its CPCN. In discussing that issue, the parties should discuss the Commission's order in Pasadena Neighborhood Coalition v. Altrio Communications, Inc., D.03-12-064, 2002 Cal. PUC LEXIS 1060, *10.)

I have reviewed CCSF's contention that radio frequency transport service is not a competitive local exchange service and find merit in CCSF's position that radio frequency transport service does not strictly fit that definition. Nonetheless, there appears to be no dispute that NextG is a telephone corporation as defined under Pub. Util. Code § 234(a). I request that the parties address whether the Commission must create new regulatory classifications for service offerings by telephone corporations. I also request that CCSF address the authority supporting its position that "[t]he Commission does not regulate the provision of R[adio] F[requency] transport services because NextG's RF transport service is neither a competitive local exchange nor an interexchange service."

In the pleadings on NextG's motion to dismiss, the parties have addressed the claims raised in CCSF's complaint. If the parties believe there are issues not raised in those pleadings that the Commission should resolve in this proceeding, the parties should discuss them in their comments and state why those issues are relevant to matters raised in the complaint and answer.

IT IS RULED that responses to this ruling are due on May 27, 2005 and replies are due on June 6, 2005, as set forth herein.

Dated May 20, 2005, at San Francisco, California.

/s/ Janice Grau

Janice Grau
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Administrative Law Judge's Ruling Requesting Supplemental Information, Explanation of Apparent Ex Parte Communication, and Further Briefing On Motion To Dismiss by using the following service:

☐ E-Mail Service: sending the entire document as an attachment to all known parties of record who have provided electronic mail addresses.

☒ U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Dated May 6, 2005, at San Francisco, California.

/s/ Antonina V. Swansen

Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.